

**BEFORE THE INSURANCE COMMISSIONER
OF THE STATE OF UTAH**

COMPLAINANT:

UTAH INSURANCE DEPARTMENT

RESPONDENT:

RICK C. GATES
4901 South Lake Drive, #29-C
Murray, UT 84107

License No. 39180

ORDER ON HEARING
(Formal Hearing)

DOCKET No.s 2008-144-LC
Enf. Case No. 2193 (Revocation)
Enf. Case No. 2302 (Renewal)

Mark E. Kleinfield,
Presiding Officer

STATEMENT OF THE CASE

THIS MATTER concerning whether the Respondent's renewal application for a producer license (Title Marketing Representative) should be denied (Enf. Case No. 2302) and whether Respondent's producer license (Title Marketing Representative) should be revoked (Enf. Case No. 2193) came on to be heard before the Commissioner of the Utah State Insurance Department ("Department") on Wednesday, January 7, 2009 at 9:00 o'clock A. M. Mountain Time, with Mark E. Kleinfield, Administrative Law Judge, serving as designated Presiding Officer.

Said hearing being held at the Department's offices located at the Utah State Office Building, Room B-100, Salt Lake City, Utah 84114, having been convened at the designated time of 9:00 (9:41) A. M., January 7, 2009 and adjourned at 10:35 A. M. on said same day.

Appearances:

M. Gale Lemmon, Utah Assistant Attorney General, Attorney for Complainant Utah Insurance Department, State Office Building, Room 3110, Salt Lake City, Utah 84114.

Gregory G. Skordas, Skordas, Caston & Hyde, L. L. C., Attorney for Respondent, 341 South Main Street, Suite 303, Salt Lake City, Utah 84111.

By the Presiding Officer:

Pursuant to a December 1, 2008 Pre-Hearing Conference Order this matter was set for hearing on January 7, 2009. A Formal Hearing was conducted on January 7, 2009 in the above-entitled proceeding. The Respondent was present at that time.

The hearing was convened and conducted as a **formal hearing** in accordance with Utah Code Ann. Sections 63G-4-204, 63G-4-205, 63G-4-206, 63G-4-207 and 63G-4-208 and Administrative Rule R590-160-6.

ISSUE, BURDEN and "STANDARD OF PROOF"

1. The basic issue as to Enf. Case No. 2302 (Renewal):

a. Was Applicant's application for renewal of a resident producer's license as a Title Marketing Representative improperly denied?

b. Has the Applicant presented sufficient evidence to show that the Department's denial was not justified on the record?

c. Has the Applicant presented sufficient evidence that would justify the reversal of such denial? (SEE Paragraph 6 under *DISCUSSION-ANALYSIS*.)

2. The basic issue as to Enf. Case No. 2193 (Revocation):

a. Should Respondent's producer license as a Title Marketing Representative be revoked? (SEE also Paragraphs 7-9 under *DISCUSSION-ANALYSIS*.)

3. a. The "*burden of proof*" or "*burden of going forward*" in Enf. Case No. 2302 as to the above issue(s) of whether a producer license should be renewed or issued is on the Respondent; and

b. The "*burden of proof*" or "*burden of going forward*" in Enf. Case No. 2193 as to the above issue(s) of whether Respondent's producer license should be revoked is on the Complainant Department.

4. As per Utah Administrative Code Rule, R590-160-5(10) as to the above and foregoing "issue(s)" or "question(s)" to be answered the "*standard of proof*" as to issues of fact as to both matters is to be proven by a "*preponderance of the evidence*".

Both the Complainant Department and Respondent presented opening statements.

Evidence was pro-offered and received.

The remainder of the hearing being conducted in the nature of oral argument as per the agreement of the parties, concurred in by the Presiding Officer, that the issues were determinative as legal in nature.

SUMMARY OF THE EVIDENCE

The parties entered into and submitted a written Stipulation of Facts under date of January 7, 2009.¹ SEE file.

As per a December 1, 2008 Pre-Hearing Conference Order the parties were permitted to file pre-hearing briefs. The Respondent filed a pre-hearing Memorandum under date of January 5, 2009. SEE file. The Complainant Department did not file a pre-hearing memorandum.²

Argument followed.

The Presiding Officer being fully advised in the premises and taking administrative notice of the files and records of the Department, now enters his *Findings of Fact, Conclusions of Law, and Order*, on behalf of the Department:

FINDINGS OF FACT

I, find by a preponderance of the evidence, the following facts:

1. The Utah Insurance Department ("Department") is a governmental entity of the State of Utah. The Department as per Utah Code Ann. Section 31A-2-101 is empowered to administer the *Insurance Code*, Title 31A, Utah Code Ann., 1953, as amended.

¹ Several interlineations were made by the parties at the hearing. SEE file.

² At the conclusion of the hearing the Presiding Officer permitted the filing of simultaneous post-hearing memorandum by the close of business, 6:00 o'clock P. M. Mountain Time, Wednesday, January 28, 2009. The Department filed a post-hearing memorandum. The Respondent did not file a post-hearing memorandum.

As to Enf. Case No. 2302 (Renewal):

2. The Applicant, Rick C. Gates:

a. is a resident of the State of Utah and maintains a present residence of 4901 South Lake Drive, #29-C, Murray, Utah 84107;

and

b. has previously been licensed by the Department as a resident “Producer” to conduct or be engaged in the insurance business in the State of Utah.³

3. The Applicant on or about August 31, 2008 filed his application with the Department for renewal and issuance of a Utah “Resident Producer Individual License” as a Title Marketing Representative.

4. The Department on or about October 23, 2008 in writing denied Applicant's “application for the August 31, 2008 renewal of [your] Utah resident producer individual “ for the following reason:

“Failure to meet the character requirements under Utah Code Annotated (UCA) 31A-23a-107.”

5. That included in said denial were instructions informing Applicant of his right to an “*informal hearing*” if a timely request is made in writing within fifteen (15) days. (SEE Administrative File.)

6. The Applicant under date of October 30, 2008 through legal counsel filed his “*request for hearing*” with the Department on November 3, 2008. (SEE Administrative File.)

As to Enf. Case No. 2193 (Revocation):

7. The Respondent, Rick C. Gates, is a licensed resident producer as a Title Marketing Representative in the State of Utah, License No. 39180, and is a resident of the State of Utah maintaining a present residence of 4901 South Lake Drive, #29-C, Murray, Utah 84107.

³ As per paragraph 2 of the parties' January 7, 2009 Stipulation of Facts “[O]n March 25, 2004 Respondent’s search and escrow lines of authority were revoked pursuant to a stipulation with the Utah Insurance Department (Docket No. 2003-373-PC, attached hereto as Exhibit A). Mr. Gates was allowed to retain a title marketing line of authority and such license placed on probation for a period of one year.” Respondent’s search and escrow license having originally been issued on February 22, 1980. See paragraph 1 of January 7, 2009 Stipulation of Facts. SEE file.

8. As per paragraph 4 of the parties' January 7, 2009 Stipulation of Facts "[O]n March 31, 2008, Mr. Gates plead guilty in Third District Court, Salt Lake City, Salt Lake County, State of Utah to one charge of unlawful dealing with property by a fiduciary, a 2nd degree felony (court docket, case no. 071901195, attached hereto as Exhibit B)." SEE file.

9. a. That the Complainant Department filed its Complaint requesting revocation of the Respondent's producer license as a Title Marketing Representative under date of November 13, 2008 on November 13, 2008.

b. Both matters, Enf. Case No. 2302 and Enf. Case No. 2193, were combined under the sole Enf. Case No. of 2302 and Docket No. 2008-144-LC, with a "Notice of Conversion to Formal Proceeding and Notice of Pre-Hearing" setting 9:00 A. M., December 1, 2008 at the Department offices, 3110 State Office Building , Salt Lake County, Utah as the date and place for Pre-Hearing being mailed to the Respondent's legal counsel on November 17, 2008.

10. That based on the preliminary facts as set forth in paragraphs 1 through 9, immediately above, through means of a December 1, 2008 "Pre-Hearing Conference Order", mailed to the Respondent's legal counsel on December 1, 2008, this present hearing was set for January 7, 2009 at 9:00 A. M..

DISCUSSION-ANALYSIS

1. a. Both the Respondent and the Department in large measure while advocating clearly different characterizations or interpretations of the above referenced facts in substance concurred as to the basic *chronology* and core facts.

b. The record now being complete sets forth competent and credible evidence for the entry of the following analysis.

2. As per paragraph 4 of the parties' January 7, 2009 Stipulation of Facts "[O]n March 31, 2008, Mr. Gates plead guilty in Third District Court, Salt Lake City, Salt Lake County, State of Utah to one charge of unlawful dealing with property by a fiduciary, a 2nd degree felony (court docket, case no. 071901195, attached hereto as Exhibit B)." SEE file.

As to Enf. Case No. 2302 (Renewal):

3. Respondent's guilty plea and conviction to a 2nd degree felony of unlawfully dealing with property by a fiduciary on March 31, 2008 or less than six (6) months prior to his filing of his renewal application speaks for itself and speaks to the Hearing Officer, like it would to any member of the public, volumes as to the Respondent's character.

4. a. Acknowledging the underlying incident occurred in 2004 growing out of an approximate \$140,000.00 overdrawing of then search and escrow licensed Respondent's escrow account with such incident being the basis of the Respondent's March 24, 2004 [S]tipulation to acquiesce of revocation of his search and escrow license and the granting of a probationary marketing line such March 24, 2008 Stipulation was not a "pass" or "waiver" of the Utah Insurance Commissioner's ongoing responsibility to protect the public interest.

b. In substance this is the argument the Respondent seems to attempt to make when Respondent argues "[t]he Commissioner should use his authority to renew Mr. Gate's line of authority. The Department was the first state agency to become aware of his actions and upon a fully-informed analysis of the incident, it decided that Mr. Gates should retain his marketing line of authority. Nothing has changed since the 2004 stipulation to indicate the Department's rationale was flawed." (EMPHASIS ADDED).

c.i. **Much has changed.** Respondent has plead guilty to a 2nd degree felony.

ii. While Respondent argues "[A]lthough the State charged Mr. Gates three years after the Department disciplined him, the fact that he was punished criminally after he was punished administratively is an unreasonable reason to deny his renewal application" the simple and reality laden fact is that the Respondent is now a convicted felon in violation of Utah Code Annotated § 31A-23a-111(5)(b)(xiv).

iii. Such conviction by more than implication casting a dark shadow over the Respondent's character as to being in the insurance business.

iv. The Respondent fails to meet the character requirements for licensing.

5. The Department in renewing or licensing the Respondent or any individual in comparable circumstances to the Respondent would be breaching its responsibilities to the public.

6. a. The Presiding Officer can only look at and weigh the **present** evidence before him.

b. Here in the **present** instance the burden is/was on the Applicant to:

i. **Present** sufficient evidence to show that the Department's denial was not justified on the record; and

ii. **Present** sufficient evidence that would justify the reversal of such denial.

c. This the Respondent has failed to do.

d. The Respondent's August 31, 2008 renewal application was properly denied based on the record before the Department.

As to Enf. Case No. 2193 (Revocation):

7. Respondent's guilty plea and conviction to a 2nd degree felony of unlawfully dealing with property by a fiduciary on March 31, 2008 equates to a "*res ipsa loquitor*" like acknowledgment by Respondent as to his violation of the multiple subsections of Utah Code Annotated § 31A-23a-111(5)(b) alleged by the Department in its November 13, 2008 filed Complaint.

8. The Respondent through counsel argues that the Commissioner's authority is discretionary and not mandatory as to whether or not Respondent's license should be revoked. Such is correct as the language is permissive through the use of word **may** in the relevant statutory section(s).

9. a. The Department though, as in the renewal determination, would in permitting the Respondent or any individual in comparable circumstances to the Respondent to continue in the insurance business would be abusing its discretion and breaching its responsibilities to the public.

b. The Utah title industry has been racked scenario after scenario by unscrupulous escrow officers and title companies as cohorts with questionable appraisal and lending practices by appraisers and financial institutions leaving a "bad taste" in the public's mouth and mind. Acknowledging the Respondent's conviction may well grow out of something "lesser" such actions by the Respondent still have been charged and plead to as a 2nd degree felony. The Department's actions in seeking revocation after a felony conviction are comparable to like past felony conviction circumstances.

c. Anything short of revocation would send an inappropriate message to both the public and the industry that let alone a 2nd degree felony conviction but one directly revolving around insurance transaction(s) will be condoned.⁴ Notwithstanding the circumstances took place in March 2004⁵ the conviction was in March 2008. It simply cannot be condoned in light of the myriad of present financial catastrophes engulfing the country as well as recent Utah title industry problems.

⁴ Again Respondent's "argument" that the Department March 24, 2004 Stipulation was "correct" and still should control does not overcome the **present** reality of a 2nd degree felony conviction. Arguably the Department's March 24, 2004 entering into a stipulation decision(s) may well have been misguided itself but such was the decision at the time. It is noted that the present Presiding Officer "approved" the earlier stipulation with the entering of an attendant March 25, 2004 Order. Hindsight is 20-20. The past though is past. The present can and must be judged under the circumstances of the present.

⁵ In actuality as paragraphs 5 and 6 on pages 3 and 4, "Findings of Fact", of the March 25, 2004 attendant Order (to the Stipulation) the Respondent conducted closings and overdraws of the escrow account took place "[D]uring the period of about January 2003 through November 2003".

10. Respondent's license should be revoked pursuant to:

- a. Utah Code Annotated § 31A-23a-111(5)(b)(i), is (as) unqualified for a license;
- b. Utah Code Annotated § 31A-23a-111(5)(b)(xii), improperly withholds, misappropriates, or converts any monies received in the course of doing an insurance business;
- c. Utah Code Annotated § 31A-23a-111(5)(b)(xiii), violates the federal Violent Crime Control and Law Enforcement Act of 1994, 18 U. S. C. §1033; and
- d. Utah Code Annotated § 31A-23a-111(5)(b)(xiv), is convicted of a felony.

BASED ON THE ABOVE AND FOREGOING FINDINGS OF FACT and discussion-analysis the Presiding Officer enters the following:

CONCLUSIONS OF LAW

As to Enf. Case No. 2302 (Renewal):

1. The Department's "*letter of denial*" under date of October 23, 2008 should be affirmed.
2. The Applicant's August 31, 2008 renewal application for licensure as a "Resident Producer Individual License" as a Title Marketing Representative should be denied.

As to Enf. Case No. 2193 (Revocation):

1. That the Complainant-Department's Complaint as to revocation of the Respondent's producer license as a Title Marketing Representative is sustained by a preponderance of the evidence.
2. That the Respondent's producer license as a Title Marketing Representative should be revoked.

AND BASED ON THE ABOVE AND FOREGOING CONCLUSIONS OF LAW
the Presiding Officer enters the following:

RECOMMENDED ORDER

WHEREFORE, IT IS RECOMMENDED to the Utah Title Commission that:

As to Enf. Case No. 2302 (Renewal):

1. The Department's "*letter of denial*" under date of October 23, 2008 be **affirmed**;
and

2. The Applicant's August 31, 2008 renewal application for licensure as a "Resident Producer Individual License" as a Title Marketing Representative be **denied**.

As to Enf. Case No. 2193 (Revocation):

1. The Respondent's producer license as a Title Marketing Representative be **revoked** effective upon entry of the present Order.

DATED and ENTERED this 3 day of February, 2009.

**D. KENT MICHIE,
INSURANCE COMMISSIONER**





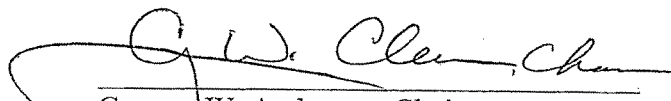
MARK E. KLEINFELD
ADMINISTRATIVE LAW JUDGE and
PRESIDING OFFICER

Utah Insurance Department
State Office Building, Room 3110
Salt Lake City, Utah 84114
Telephone: (801) 537-9246
Facsimile: (801) 538-3829
Email: MKleinfeld@utah.gov

IMPOSITION OF PENALTY

By a vote of 5, in favor of the recommendation, to 0, against the
recommendation, taken in open meeting on this date, the Utah Title and Escrow
Commission hereby imposes the penalties recommended in the Order herein above

Dated this 12th of February, 2009.

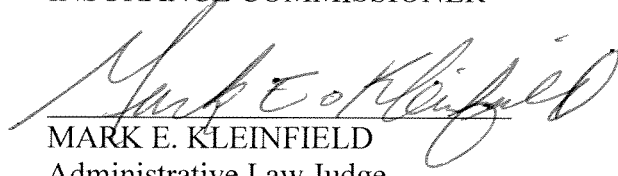

Canyon W. Anderson, Chairman
Utah Title and Escrow Commission

CONCURRENCE WITH COMMISSION IMPOSED PENALTY

On behalf of the Commissioner of the Utah Insurance Department I hereby concur
with the penalty imposed by the Utah Title and Escrow Commission in the above matter.

DATED this 12th day of February, 2009.

D. KENT MICHIE
INSURANCE COMMISSIONER


MARK E. KLEINFELD
Administrative Law Judge

ADMINISTRATIVE AGENCY REVIEW

Administrative Agency Review of this Order may be obtained by filing a Petition for Review with the Commissioner of the Utah Insurance Department within thirty (30) days of the date of entry of said Order consistent with Utah Code Ann. Section 63G-4-301 and Administrative Rule R590-160-8.

Failure to seek agency review shall be considered a failure to exhaust administrative remedies.

(R590-160-8 and Section 63G-4-401)

JUDICIAL REVIEW

As an “**Formal Hearing**” after agency review judicial review of this Order may be obtained by filing a petition for such review consistent with Utah Code Ann. Section 63G-4-403.

CERTIFICATE OF MAILING

I do hereby certify that on this date I mailed, by regular mail, postage prepaid a true and correct copy of the attached:

ORDER ON HEARING

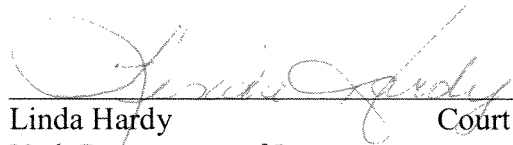
License Denied
&
License Revoked

To the following:

Rick C. Gates
4901 South Lake Drive, #29C
Murray UT 84107

Gregory G. Skordas
Skordas, Caston, & Hyde, LLC
341 South Main Street, Suite 303
Salt Lake City, UT 84111

DATED this 17th day of February, 2009.



Linda Hardy Court Clerk
Utah Department of Insurance
State Office Building, Room 3110
Salt Lake City, UT 84114-6901